No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To Intervene and File Answer

BRIEF OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO DUKE ENERGY CAROLINAS, LLC'S MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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INTRODUCTION

South Carolina brings this original action against North Carolina to obtain an equitable apportionment of the Catawba River, which flows from North Carolina into South Carolina. South Carolina alleges that North Carolina has authorized a series of interbasin water transfers from the Catawba River and thereby exceeded its equitable share of the river. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from authorizing interbasin transfers and other consumptive uses inconsistent with that apportionment.

Duke Energy Carolinas, LLC ("Duke"), which, pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"), operates a series of hydroelectric plants at various points along the Catawba River in both States, now moves to intervene. Such intervention is both unprecedented and inappropriate. As this Court has made clear, private parties have no right to intervene in equitable apportionment cases, which involve inherently sovereign functions in allocating trans-boundary river waters for the benefit of *all* citizens in the respective party States. Indeed, Duke cannot point to a single equitable apportionment case where the Court has permitted a private party to intervene.

Duke points to a pending FERC proceeding and the fact that it uses water on both sides of the boundary. Neither argument has merit. As a private entity, Duke has no basis to assert any "public interest" in FERC proceedings or licenses. To the extent Duke has interests stemming from its FERC license to protect, those can be accomplished short of full party status. In any event, by its request to obtain status

as a defendant. Duke perceives that whatever apportionment is awarded to North Carolina would be in its greatest interest. Yet it offers no reason why North Carolina cannot adequately represent that interest. And whatever apportionment South Carolina obtains will inure to Duke's benefit concerning its plants on both sides of the boundary.

What Duke seeks by intervention is something the Court has never countenanced: treating a private user of water the same as a sovereign. Duke cannot meet its heavy burden, therefore, to demonstrate a "concrete" and "compelling interest in [its] own right, . . . which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373, 374 (1953) (per curiam); *accord Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995). And the state-law rights in both States to water usage are adequately protected – as they are for users on either side of the boundary – by both States. *See New Jersey v. New York*, *supra*; *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). To the extent Duke has factual or technical information and expertise relevant to the resolution of the issues in this case, such information can be obtained through third-party discovery or Duke's participation as an *amicus curiae* at an appropriate stage of the proceeding. Duke can point to no instance in which this Court permitted intervention and full party status in an original action simply because an entity claims to possess relevant information. Accordingly, Duke's motion to intervene should be denied.

ARGUMENT

THE COURT SHOULD DENY DUKE'S MOTION TO INTERVENE

A. Intervention By Private Parties In Original Actions Is Rare And Disfavored

It is fundamental that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party States *as between each other* and not among individual water users within those States. Thus, private water users – even "[l]arge industrial plants which . . . are corporate creatures of the state" and have "substantial" interests in the use of river water – have consistently been held to have no right to intervene in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 372-74 (denying Philadelphia's motion to intervene because Pennsylvania represented its interests); *see also United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam).

Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree *without* the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. at 22 (emphasis added); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Against that longstanding rule, Duke's request is unprecedented: Duke cannot cite a single equitable apportionment case in which this Court has allowed a private water user to intervene. *See infra* pp. 11-13.

To overcome this Court's strong presumption against intervention in original actions, Duke ac-

knowledges (at 8-9) that it "ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. Put differently, Duke must "point out [some] concrete consideration in respect to which the [relevant party State's] position does not represent [Duke's] interests." *Id.* at 374. Duke fails to satisfy that heavy burden.

B. Duke's Interests Are Not "Compelling" And In Any Event Are Adequately Represented By The Party States

Duke relies (at 2-3) on three interests it claims to represent and that purportedly justify its intervention as a party in this original equitable apportionment action: (1) "federal" "public interests" reflected in Duke's FERC license and the Federal Power Act ("FPA"); (2) "[e]xisting uses" of water by both "Duke and the businesses and communities dependent on Duke's facilities and operations"; and (3) Duke's right "as an impounder of water" under a North Carolina statute "to the excess water obtained by virtue of the impoundment." None of those asserted interests comes close to satisfying Duke's heavy burden to persuade this Court – for the first time in history – to permit a private water user to intervene as a party in an equitable apportionment suit.

1. Duke's primary assertion is that its participation will help to protect "the public interests recognized by federal law and protected by Duke's FERC License under the Federal Power Act." Mot. 3; *see also* Mot. 1, 2, 9, 12, 14, 15 (asserting to represent "public" interests). But Duke is not the proper party

to represent "public interests" arising under federal law under this Court's original jurisdiction.

As a publicly held corporation, Duke's duty is to "maximize the return on their shareholders' investments." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990). Thus, to the extent Duke advocates interests it has received pursuant to federal law, it does so only as a profit-maximizer – not as a designated representative or agent of the government or laws creating those federal public interests.[1] That fundamental distinction is dispositive of Duke's claim.

In contrast, the United States and FERC advocate and consider a broad array of public interests. For example, under the FPA, before issuing a permit, FERC is obliged to ensure adequate protection of "fish and wildlife," "irrigation, flood control, water supply, and recreational and other purposes." 16 U.S.C. § 803(a)(1). As a private, for-profit corporation, Duke has no such duties. Corporate interests such as those that Duke *does* represent – unlike sovereign interests – are inherently transitory, turning on economic interests that change with different market conditions. What Duke's current managers believe to be an advantageous apportionment of the Catawba River for Duke's own profit-making incentives may not serve the varied needs of both States' citizens well in the long run; yet, by granting party status to Duke, the Court would be creating a dynamic unlike that in any reported equitable apportionment case.

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[1] *Cf. Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2307-08 (2007) (rejecting claim that heavily regulated corporation's compliance with federal law deems it to be "acting under" a federal "officer" or "agency").

To the extent the United States wishes to intervene to protect federal interests, this Court has "often permitted the United States to intervene in appropriate cases where distinctively federal interests, best presented by the United States itself, are at stake." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (allowing permissive intervention based on the "United States' interests in the operation of the [Outer Continental Shelf Lands] Act" and "FERC's interests in the operation of the Natural Gas Act"). Duke can cite no case in which this Court has permitted original action intervention by a private party to represent federal public interests.

Nor is there reason to think that any private interests Duke has by virtue of its license from FERC justifies intervention. North Carolina, on whose side Duke seeks to intervene, has already advanced the same arguments suggested by Duke here. Specifically, North Carolina urges that the proposed Comprehensive Relicensing Agreement ("CRA") terms for renewal of Duke's FERC license are sufficient to protect South Carolina's interests in this original action. *See* NC Opp. 11-17 (filed Aug. 7, 2007). Those are the same terms proposed to FERC on which Duke relies. *See* Mot. 2-3, 5-6. Moreover, § 39.9 of the proposed CRA expressly *disclaims* resolution of the water rights issues raised in this case:

> Water Rights Unaffected – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

Duke notably does *not* claim that its interests in the proposed CRA differ materially from North Carolina's position in this litigation. Moreover, the FERC proceedings are a matter of public record, and the

parties have brought and will continue to bring the relevant portions of those legal sources to the Court's and the Special Master's attention. Duke has not, however, adduced any concrete dispute as to the meaning of either the CRA (which is currently of no legal effect) or its current license, nor does Duke point out any particular provision of its license or the CRA that is ambiguous, or that it fears will be misconstrued by the party States, a Special Master, or this Court. Thus, the FERC proceedings provide Duke with no basis to intervene.

2. Duke's reliance (at 2-3) on the "[e]xisting uses of water such as those by Duke and the businesses and communities dependent on Duke's facilities and operations" fares no better. In this respect, Duke relies (at 3) on the fact that it has "reservoirs and facilities located in *both* Carolinas." Thus, although Duke acknowledges (as it must) that "a sovereign is generally presumed to represent the interests of all its citizens," Duke claims that "[n]either State will represent Duke's particular amalgam of federal, state and private interests." Mot. 13-14. Duke cites no authority for that "amalgam" theory, and, indeed, it finds no support in this Court's precedents.

As explained above, Duke's so-called "federal" interests concerning the FERC proceeding provide no cause for intervention here. And Duke's "state and private" interests plainly provide no basis for intervention, because such an argument would be invoked by *all* private users of water to justify intervention. But that is precisely what this Court has repeatedly refused to do. Crediting Duke's "amalgam" theory here would be directly contrary to this Court's policy of maintaining "practical limitation[s] on the number of citizens, as such, who would be entitled to be made parties," and ensuring that the Court's original juris-

diction not be "expanded to the dimensions of ordinary class actions" or used to draw the Court into "intramural" disputes over a State's water allocation between users. *New Jersey v. New York*, 345 U.S. at 373.

This Court's precedents make clear that Duke's claimed state-law and private interests are conclusively represented by the respective States.[2] In *Kentucky v. Indiana*, the party States had agreed to an interstate compact to build a bridge across the Ohio River. Indiana citizens sought to enjoin construction of the bridge in Indiana state court, and the resulting delay caused Indiana to breach the compact. After Kentucky invoked this Court's original jurisdiction to seek specific performance, Indiana answered that "[t]he State of Indiana believes said contract is valid" and that the "only excuse" it had for delaying its performance was the state-court litigation its citizens brought. *See* 281 U.S. at 169-71. This Court granted Kentucky's requested relief, including enjoining the Indiana state court litigation, holding that

> [a] State suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as

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[2] Indeed, Duke points to no concrete interest regarding its North Carolina operations that is not adequately represented by North Carolina, nor does Duke point to any of its interests in South Carolina that South Carolina has failed to defend. To the contrary, South Carolina's brief in support of its motion for leave to file this action expressly alleged (at 1) that North Carolina's interbasin transfers "directly harm South Carolina" by, among other things, "reducing the flow of water available for the generation of hydroelectric power."

> complainant or defendant, is conclusive upon this point.

Id. at 173. Were it "[o]therwise," the Court explained, "all the citizens of both states, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard." *Id.*

This principle forecloses Duke's arguments for intervention. As *Kentucky v. Indiana* makes clear, Duke's own view as to the scope of its state-law rights would have no bearing on the Court's resolution of this case, for the position taken by the party States as to the content of their own law, and Duke's rights thereunder, will be conclusive.

3. That same principle forecloses Duke's reliance on a North Carolina statute permitting the "withdrawal of excess volume of water attributable to the impoundment" of water in a reservoir. *See* Mot. 3, 10 (quoting N.C. Gen. Stat. Ann. § 143-215.44(a)). Duke's argument only reinforces that Duke seeks to raise an intramural issue over how it should fare under the North Carolina statute. As the Court has made very clear, such issues or disputes that a private party has with a State may not be injected into an original action. *See New Jersey v. New York*, 345 U.S. at 373 ("If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.").

In any event, regardless of what rights North Carolina grants Duke or other water users under its own law, state-law rights cannot trump the federal common law of equitable apportionment. As the Court explained in *Hinderlider*, "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon

which neither the statutes nor the decisions of either State can be conclusive." 304 U.S. at 110. It is thus well-established that the state-law rights of a "private appropriator . . . can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Thus, Duke's claimed state-law rights will necessarily rise and fall with the claims of the party States, and Duke has no right to be accorded the full status of a party in a suit brought pursuant to this Court's original jurisdiction in Article III of the Constitution.

Duke also relies on its supposed "unique" status in claiming that allowing it to intervene will not "open the floodgates" to others. Mot. 14. But Duke's reference to the "[e]xisting uses of water such as those by Duke and the businesses and communities dependent on Duke's facilities and operations" (Mot. 2-3) shows that Duke has similar interests to other users of water from the river, which include the various North Carolina municipalities that received interbasin transfers from the Catawba River that South Carolina specifically challenges. Duke's position is further belied by the motion to intervene by the Catawba River Water Supply Project, which makes many of the same arguments advanced by Duke, such as its unique status as an entity with water consumption in both States and its status as a large consumer of Catawba River water. Whatever interest Duke has as a matter of scale will be accommodated in the States' presentations on the various factors guiding equitable apportionment.

C. The Precedents On Which Duke Relies Are Inapposite

Duke relies on three cases, none of which granted intervention to a private party in an equitable apportionment action. Duke is thus mistaken to contend (at 11) that, "[m]ost notably," *Arizona v. California*, 460 U.S. 605 (1983), supports intervention here. In that case, the Court permitted Indian Tribes to intervene in an equitable apportionment action, but only because the Tribes are afforded special protections under federal law. As the Court explained, "the Indians are entitled to take their place as independent qualified members of the modern body politic," and therefore "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id.* at 615 (internal quotation marks omitted); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). Because of their sovereign status, the Tribes did not have to show that the United States would inadequately represent their interests. *See Arizona v. California*, 460 U.S. at 615 n.5. Duke, of course, is a private-sector utility company, not a sovereign entity, and thus *Arizona v. California* does not support its intervention request. *See* Mot. 8-9 (acknowledging that sovereign entities are treated differently from private parties in original actions).

Duke's reliance on *Maryland v. Louisiana* is no more persuasive. That case did not involve equitable apportionment or water use, but was a constitutional challenge to a "first-use" tax imposed by Louisiana directly on out-of-state exporters of natural gas brought into Louisiana. The Court allowed intervention by the pipeline companies required to pay the tax on the ground that "the Tax is directly imposed on the owner of imported gas and . . . the pipelines

most often own the gas." 451 U.S. at 745 n.21. Because the tax was imposed directly on the pipelines, the pipelines had an interest in invalidating the tax that was independent of the interest and authority of the plaintiff States. Notably, that case did not raise the same floodgates problem that Duke's motion does here. In contrast with the discrete number of pipelines directly taxed that were at issue in *Maryland v. Louisiana*, hundreds – if not thousands – of entities in both States depend on the Catawba River.

With respect to this Court's apportionment of river waters, it is well-settled that "the apportionment is binding upon the citizens of each State and all water claimants," even where the State had granted the water rights before it entered into the compact. *Hinderlider*, 304 U.S. at 106; *see also Nebraska v. Wyoming*, 515 U.S. at 22. Accordingly, Duke's reliance on *Maryland v. Louisiana* is unavailing, as that case has no application to the special circumstances presented by equitable apportionment cases. Indeed, whereas in *Maryland v. Louisiana* the Court noted in passing "that it is not unusual to permit intervention of private parties in original actions," 451 U.S. at 745 n.21, that is plainly not so in equitable apportionment cases, where this Court has repeatedly made clear that individual water users have "no right to intervene in an original action in this Court," *United States v. Nevada*, 412 U.S. at 538.

Finally, *Oklahoma v. Texas*, 258 U.S. 574 (1922), which Duke cites in a footnote, is off point. As a temporary remedial measure in a boundary dispute, the Court in that case appointed a receiver to take possession of certain lands and "to control or conduct all necessary oil and gas operations" pending "the solution of the controversy." *Id.* at 580. The Court also "provided for such interventions in the suit as

would permit all possible claims to the property and proceeds in the receiver's possession to be freely and appropriately asserted." *Id.* These circumstances are plainly not analogous here. Moreover, contrary to Duke's suggestion, the Court did *not* allow private parties to intervene as to the merits of the boundary dispute, recognizing that the outcome of the boundary dispute between the States would govern their private property rights.[3]

D. Duke's Interests Can Be Protected In Ways Short Of Full Party Status

Duke contends that it has relevant knowledge and expertise that will be helpful in resolving the issues that will be in play in this case. This Court has never held that mere possession of relevant facts, documents, or knowledge is a proper basis for intervening in an original action; indeed, such a showing would not even suffice under the more lenient rules for intervention set forth in Federal Rule of Civil Procedure 24. The party States, of course, will have access to any such information through third-party

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[3] It bears noting that *Oklahoma v. Texas* was decided at a time when it was unclear whether private parties would be bound by the results of an original action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2001 replace. vol.) ("Beck"). In 1932, the Court clarified that an equitable apportionment decree binds the citizens. *See Wyoming v. Colorado*, 286 U.S. at 508-09; *Nebraska v. Wyoming*, 295 U.S. at 43. Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 1 Beck § 45.03(b), at 45-21.

discovery (if necessary). Permitting Duke (or any other water claimant) to intervene with full party status would likely complicate discovery and factual development, as well as lead to more protracted proceedings. Yet, given the current drought conditions in the Catawba River Basin, both States and their water users will benefit from resolution of this matter as expeditiously as possible so that plans for adequate intrastate water allocation can be made accordingly.

Duke cannot demonstrate why participation as an *amicus curiae* would be insufficient to assert its interests. Regardless of what the Special Master were to recommend, Duke would be free to file an *amicus* brief on the merits, either supporting or criticizing the Special Master's report and recommendations. *See* Sup. Ct. R. 37.3; *see also Ohio Bureau of Employment Servs.* v. *Hodory*, 429 U.S. 814 (1976) (denying leave to intervene but granting leave to file *amicus* brief); *Northbrook Prop. & Cas. Ins. Co.* v. *Edwards*, 511 U.S. 1103 (1994) (same). In *New Jersey* v. *Delaware*, No. 134, Original, which directly implicated whether BP plc could build a liquefied natural gas terminal that crossed the state boundary, BP provided third-party discovery in proceedings before the Special Master and then participated formally as an *amicus* on exceptions to the Special Master's report and recommendations. There is no cause to grant Duke the status of a party in an original action, where such actions serve to adjudicate the rights between States, not private parties.

CONCLUSION

Duke's motion for leave to intervene and file answer should be denied.

Respectfully submitted.

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